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December 1, 1997

DOCKET FILE COPY ORIGINAL

To: Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

From: Dan Thompson, Executive Director, League of Wisconsin Municipalities
Edward J. Huck, Executive Director, Wisconsin Alliance of Cities

Re: Comments on Chibardun Telephone Cooperative's Petition For Preemption of
Actions of City of Rice Lake, Wisconsin;
CC Docket No. 97-219

Please find enclosed the original and six copies of the League of Wisconsin Municipalities' and the Wisconsin Alliance of Cities' joint comments concerning the above-referenced Petition.

Additional copies of the League's and Alliance's joint comments are being sent today to: (1) Janice M. Myles, Common Carrier, Bureau, Federal Communications Commission, Room 544, 1919 M Street, N.W., Washington, D.C. 20554; (2) the Commission's contractor for public service records duplication, International Transcription Services, Inc., 1231 20th Street, N.W., Washington, D.C. 20036; and (3) the parties to this proceeding; as directed by the public notice requesting comments on the Chibardun Petition dated October 20, 1997.

cc: Anita Gallucci
Curtis Snyder
Gerard J. Duffy
Janice M. Myles
A. Richard Metzger, Jr.
Richard Welch

Directors: Jeannette Bell, Mayor, West Allis • Margaret Ciccone, Mayor, Superior • Mark F. Dahlberg, Village President, Grantsburg • David DeAngelis, Mayor, Muskego • Meg Erler, Village President, Plover • Wayne P. Frank, Alderman, Milwaukee • Dennis Jordan, City Administrator, Berlin • Ronald Kryger, Village President, Pulaski • David E. Pelton, Mayor, Mauston • Rod Schroeder, Village President, Grafton
Executive Director: Dan Thompson

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

RECEIVED
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In the Matter of)

CHIBARDUN TELEPHONE COOPERATIVE, INC.)
CTC TELCOM, INC.)

Petition for Preemption Pursuant to)
Section 253 of the Communications Act)
of Discriminatory Ordinances, Fees and)
Right-of-Way Practices of the City of)
Rice Lake, Wisconsin)

CC Docket No. 97-219

TO: The Commission

COMMENTS ON PETITION

INTRODUCTION

The League of Wisconsin Municipalities ("the League") and the Wisconsin Alliance of Cities ("the Alliance") jointly submit these Comments on the October 10, 1997, Petition for Preemption Pursuant to Section 253 ("Petition") that Chibardun Telephone Cooperative, Inc. and CTC Telcom, Inc. (collectively, "Chibardun") filed with this Commission. For the reasons set forth below and those set forth in the City of Rice Lake's Comments on Chibardun's Petition, the League and the Alliance request the Commission to dismiss or deny the Petition.

INTEREST OF THE LEAGUE AND THE ALLIANCE

The League is an unincorporated, not-for-profit association of Wisconsin cities and villages governed by municipal officials selected by representatives of

member municipalities. Its membership consists of 369 villages and all of the 189 cities in the State of Wisconsin, including the City of Rice Lake.

The League's primary function is to act as an information clearinghouse through which municipalities cooperate to improve and aid the performance of local government. To this end, the League provides to its members services on a continuing basis, such as training courses, handbooks and manuals, model ordinances, legal information, and analysis of state and federal legislation, which most municipalities would not be able to obtain individually because of excessive costs. The League, in addition, is recognized as the principal spokesperson for Wisconsin cities and villages in both the legislative and executive branches of state government. The League also regularly files *amicus curiae* briefs in Wisconsin appellate court cases involving issues of major importance to Wisconsin municipalities.

The Wisconsin Alliance of Cities is a lobbying organization representing large Wisconsin cities with generally older downtown areas and housing stock. Its membership consists of thirty-one Wisconsin cities, including the cities of Milwaukee and Madison. The Alliance is governed by an eleven member board of directors made up of local officials from member municipalities. One of the goals of the organization is to create an urban environment that is ecologically clean and economically dynamic.

Both the League and the Alliance are vitally interested in the issues raised by Chibardun's Petition requesting the Commission to preempt the City of Rice

Lake's proposed right-of-way agreement, interim right-of-way ordinance and proposed right-of-way ordinance. Our concern arises from the fact that a substantial number of League and Alliance members are, like the City of Rice Lake, reviewing, and in many cases, changing their right-of-way regulatory schemes in response to actual or anticipated increases in the demand for use of their rights-of-way by telecommunication service providers in the wake of the federal Telecommunications Act of 1996 (the "Act " or the "1996 Act").

Until recently, practically all municipalities in Wisconsin managed the use of their rights-of-way by requiring potential users of the right-of-way to apply for and obtain a street opening permit before making any opening or conducting any excavation in a right-of-way. See Wis. Stat. § 66.045 (1995-96). Municipalities have typically charged a minimal fee for such a permit and require the permit holder to restore the street to the same or better condition than it was before the excavation. Such a minimal permit scheme served as an adequate method of managing a municipality's rights-of-way in an era when there was only one telecommunication service provider present in the right-of-way. The state of affairs has changed, however, since the enactment of the 1996 Act. When Congress adopted the Act, it intended to usher in a new era of competition in the delivery of telecommunication services. One consequence of the Act, which Wisconsin municipalities are just now starting to experience, is an increased demand by telecommunication providers for access to the public rights-of-way. Wisconsin municipalities are, for the first time in their history,

facing the possibility of having multiple telecommunication service providers seeking to occupy their rights-of-way.

As a result, many municipalities in Wisconsin are in the process of moving beyond the minimal street opening permit regulatory scheme described above and adopting a comprehensive right-of-way ordinance setting forth detailed terms and conditions for occupying and using the public rights-of-way, and imposing a right-of-way occupancy permit fee. In a number of cases, the catalyst for making this change has been, as it was in Rice Lake, the appearance on the scene of a new entrant seeking to compete against the incumbent telecommunication service provider. A number of municipalities in Wisconsin, such as, for example, the Cities of Madison and Wauwatosa, have done exactly what Rice Lake sought to do when approached by a new entrant seeking to place facilities in their rights-of-way. They have entered into a right-of-way use agreement with the new entrant governing the new entrant's use of the right-of-way until a new, comprehensive right-of-way ordinance applicable to all occupants can be adopted in the near future.

Chibardun's central argument is that Rice Lake's requirement that it sign a right-of-way agreement before placing its facilities in the right-of-way is discriminatory and in violation of Section 253(a) and (c) of the 1996 Act because the City had not previously required the incumbent telephone company or anyone else to enter into such an agreement in response to an application for an excavation permit. The League and the Alliance are concerned that if

Chibardun's interpretation of the 1996 Act prevails, municipalities will be precluded by the Act from updating or otherwise modifying their right-of-way regulatory scheme to deal with the change in the status quo that has occurred since Congress adopted the 1996 Act. Our argument set forth below focuses on this significant issue of concern to Wisconsin municipalities.

ARGUMENT

I. MUNICIPALITIES MAY EXERCISE THEIR RIGHT-OF-WAY MANAGEMENT AND COMPENSATION AUTHORITY TO ADAPT TO AN INCREASED DEMAND FOR USE OF THEIR RIGHTS-OF-WAY BY ADOPTING NEW, NON-DISCRIMINATORY AND COMPETITIVELY NEUTRAL MANAGEMENT AND COMPENSATION PRACTICES ON A GOING FORWARD BASIS.

Chibardun argues that the City's right-of-way use agreement requirement is anticompetitive and discriminatory because the requirement has been imposed for the first time against Chibardun, a new entrant, and it has not been imposed in the past on the incumbents GTE and Marcus Cable as a condition of using the right-of-way. Under Chibardun's interpretation of the 1996 Act, a municipality may never modify its right-of-way management practices in response to changing circumstances without being in violation of Section 253(a) and (c) of the 1996 Act. According to this view, a municipality's rights-of-way management practices are immutable and whatever regulatory framework a municipality has had in place in the past to manage and obtain compensation for use of its rights-of-way must remain in place indefinitely. This would mean for most municipalities in Wisconsin that they could never move beyond the minimal

rights-of-way management practices which they currently have in place and which were developed before deregulation of the telecommunications industry. This is an unreasonable and erroneous interpretation of the 1996 Act. There is nothing in Section 253 prohibiting a municipality from exercising its right-of-way management and compensation authority to adapt to an increased demand for use of its right-of-way by enacting new, non-discriminatory and competitively neutral right-of-way management and compensation practices on a going forward basis.

When determining whether a municipality's new right-of-way management and compensation scheme is non-discriminatory and competitively neutral, the Commission should not, as Chibardun insists in its Petition, compare the municipality's new practices with its previous treatment of a single incumbent provider. Rather, the Commission should determine, whether, on a going forward basis, the municipality's regulatory measures are protected under Section 253(c). As long as a municipality's new right-of-way management practices and compensation scheme apply to all right-of-way users, both new entrants and incumbents, as does Rice Lake's, it is a valid exercise of a municipality's right-of-way management powers preserved under sec. 253(c) of the Act.

A substantial number of Wisconsin municipalities are, like Rice Lake, engaged in the process of modifying their right-of-way management practices to deal with increased demands for use of their rights-of-way by

telecommunication providers. For example, the City of Madison is currently considering the adoption of a comprehensive right-of-way ordinance governing the use of its rights-of-way and requiring the payment of a right-of-way occupancy permit fee. The process of drafting, reviewing and considering the ordinance has taken nearly a year. The Madison Common Council is on the verge of, but has not yet, adopted the ordinance. In the mean time, the City has been approached by a number of new entrants seeking to compete with the incumbent telephone company. Madison has, similar to what Rice Lake attempted to do, entered into right-of-way use agreements with the new entrants. Among other things, the new entrants have agreed to abide by the terms of the City's draft telecommunications ordinance, including making an annual right-of-way occupancy permit fee payment to the City. The companies agreed to make the payment on the condition that the incumbent telephone company also be required to pay a permit fee. The City anticipates imposing a right-of-way occupancy permit fee on the incumbent in the near future when the ordinance is adopted.

Chiburdan's Petition raises the following question which needs to be answered by the Commission: When a municipality, such as Rice Lake or Madison, is approached for the first time by a new entrant seeking to place facilities in the municipality's rights-of-way, and as a result, the municipality commences a review of its existing right-of-way regulatory scheme and concludes that it is inadequate and in need of modification, how should the

municipality proceed?

It appears that a municipality can, under such circumstances, choose one of three options. First, it can establish a moratorium on granting street opening permits under its existing regulatory scheme until it enacts a new comprehensive right-of-way ordinance. See, for example, *Sprint Spectrum, L.P., v. City of Medina*, 924 F. Supp. 1036 (W.D. Wash. 1996). The difficulty with a moratorium, from the service provider's perspective, is that it delays the provider's entry into the market for the duration of the moratorium.

Another option is for the municipality to maintain the status quo and simply apply its existing right-of-way regulatory scheme even if it is determined to be inadequate. As discussed above, most municipalities in Wisconsin have traditionally only required potential users of the right-of-way to apply for and obtain a street opening permit. Typically, the fee imposed for obtaining such permits is minimal. The trouble with this approach, from the municipality's perspective, is that it is not a thorough, comprehensive scheme for managing the municipality's rights-of-way and leaves the municipality vulnerable to problems which may arise when telecommunication facilities are haphazardly placed next to or on top of other telecommunication facilities, as well as water, gas, electric and sewer lines within the right-of-way. Moreover, the fees currently charged by most municipalities for street opening permits do not sufficiently cover the actual costs incurred by the municipality as a result of the street cut. In addition, the existing permit scheme often does not contain any insurance or

indemnification requirements, requirements that are needed given the increased demand and use of the rights-of-way by telecommunication providers since deregulation of the industry.

The third and better approach is the one attempted by the City of Rice Lake, that is, allow the new entrant to place its facilities in the right-of-way while the municipality is developing a comprehensive right-of-way ordinance as long as the new entrant enters into a right-of-way use agreement with the municipality. When the City of Rice Lake received Chibardun's street opening permit applications, the City determined that its existing right-of-way regulations were inadequate to meet the increased demand for use of its right-of-way. Consequently, the City decided to develop a comprehensive right-of-way ordinance that would apply to all right-of-way users. However, the development of such an ordinance takes time. So, until the ordinance was in place, the City determined to address the interim period by seeking agreements from excavation permit applicants, such as Chibardun, seeking to undertake large new projects within the City's rights-of-way. The agreements would contain what the City anticipated would be the key elements of its future right-of-way ordinance. Such an interim regulatory scheme allows new entrants to proceed while the right-of-way ordinance is being developed and addresses the municipality's goal of managing its rights-of-way in a more thorough and comprehensive manner than it has in the past. Such an interim scheme is reasonable, within a municipality's authority and on its face competitively

neutral and non-discriminatory.

CONCLUSION

For the forgoing reasons and those set forth in the Comments filed by the City of Rice Lake, the League and the Alliance respectfully request that the Commission dismiss or deny Chibardun's Petition requesting the Commission to preempt Rice Lake's proposed right-of-way agreement, interim right-of-way ordinance and proposed right-of-way ordinance.

Respectfully submitted,

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Dated: December 1, 1997

CERTIFICATE OF SERVICE

I, Mary K. Malone, an employee of the League of Wisconsin Municipalities, hereby certify that on this 1st day of December, 1997, I did send by first-class mail, a copy of the foregoing "COMMENTS ON PETITION" to the following individuals:

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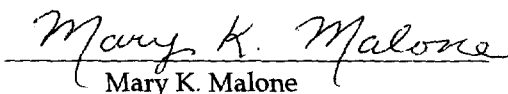
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